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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1001

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

v.

THE POSTER EXCHANGE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1970.

No.

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

v.

THE POSTER EXCHANGE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner, National Screen Service Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 24, 1970.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (A.19), not yet officially reported, is reported at TRADE REG. REP. ¶ 73,307. The opinion of the United States District Court for the Northern District of Georgia (A.1) is not reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit is dated and was entered August 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether there is anything in the antitrust laws which requires petitioner—obligated under nonexclusive license agreements with a number of motion picture companies to produce and distribute advertising material used at theatres showing the licensors' pictures—to make such advertising materials available to a jobber who is unwilling to obtain license agreements under which he would assume responsibilities to the motion picture companies similar to petitioner's but who wishes to engage solely in the distribution to theatres of advertising materials produced by petitioner.

2. Whether, in a private antitrust action, an act of the defendant may be held to be in violation of Section 2 of the Sherman Act where the doing of that act by the defendant was contemplated and permitted under a prior consent judgment in a civil antitrust action by the United States involving the same subject matter as the private action.

3. Whether the district court's unexplained award of $450,000 in treble damages to respondent can be justified on the court of appeals' theory that petitioner and respondent were competitors in the distribution of advertising material to theatres and that it is permissible to treat respondent as damaged in the amount by which petitioner's net receipts (gross receipts less cost of inventory) in the relevant geographical area exceeded those of respondent during the period for which respondent claimed damages.

STATUTORY PROVISIONS INVOLVED.

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1964):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1964):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE.

This is an action by respondent for treble damages and injunctive relief for alleged violation of the antitrust laws, brought in the United States District Court for the Northern District of Georgia under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1964).

The Facts.

This case involves motion picture advertising accessories such as posters, used for display in and about theatre lobbies and designed to stimulate public attendance at the

exhibition of the particular motion picture for which they are created.[1]

The success of a motion picture is dependent in great measure on effective advertising. The motion picture companies (hereinafter called "Producers") spend large amounts of money for advertising, and they have a direct interest in the results of this advertising because motion pictures are at times licensed to theatres for a rental based on a percentage of the theatre's box office receipts. Standard accessories are among the numerous means employed in advertising, and the regular use by theatres of such accessories is essential to obtaining maximum revenue from the exhibition of motion pictures (270 F.2d at 149).

Standard accessories have been in use for many years. Historically, it was the general practice for the Producers to design and manufacture the various kinds of accessories and distribute them to theatres from the Producers' branch offices located throughout the United States. Standard accessories cannot be used for any motion picture other than the one for which they were created. And, since it is impossible accurately to predict the success of a motion picture and, therefore, the quantity of accessories that will be required in connection with the picture's exhibition, the manufacture and distribution of standard accessories involve an inherent obsolescence risk—*i.e.*, a risk that the quantity of accessories produced for a given picture will exceed the quantity eventually used, resulting in loss of the cost of producing the excess quantity (270 F.2d at 149).

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1. The facts stated under this heading are taken from the opinion in **Lawlor v. National Screen Service Corp.**, 270 F.2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960). As the court of appeals stated in its opinion in the case at bar (A.19), "The most complete history of this industry is . . . set out" in the **Lawlor** case.

Since motion pictures are exhibited in a number of theatres on successive runs, the same accessories may be reused by different theatres. This circumstance resulted in the appearance on the business scene of what came to be known as "poster renters," such as the respondent in this case. The poster renters were individuals who obtained standard accessories and rented and rerented them to theatres for successive runs. By 1940, there was at least one poster renter in business in nearly every motion picture exchange area in the United States (270 F.2d at 149).

Beginning in 1939 and continuing until 1947, one producer after another concluded that it would be preferable to delegate the tasks of creating and distributing standard accessories to an independent contractor possessing the experience, skill and facilities necessary successfully to undertake such tasks. The contractor chosen by each of the Producers was petitioner, National Screen Service Corporation (hereinafter "National Screen") (270 F.2d at 149-150, 151). (As we shall later discuss in greater detail, the courts of appeals for the Third and Fifth circuits have both held that there was no basis for contentions that these arrangements resulted from a conspiracy in violation of Section 1 of the Sherman Act.)

The first Producer to turn over its standard accessory business to National Screen required National Screen to maintain a local branch in each city where the Producer had a branch, to manufacture and distribute a full line—*i.e.*, each of the different kinds—of standard accessories for the Producer's pictures and to purchase the Producer's existing inventory of standard accessories. Since these obligations were to involve substantial expenditures, National Screen required that it be given the protection of an exclusive license to produce and distribute the Producer's standard accessories for a five-year term (270 F.2d at 150).

Similar considerations were involved in the other Producers' standard-accessory arrangements with National Screen (270 F.2d at 150, 151).

Each of the Producers which contracted for National Screen to produce and distribute standard accessories did so "for a good and sufficient economic reason, namely, to terminate an unprofitable feature of its business" (270 F.2d at 151). All of the Producers acted independently, as a result of substantial losses in their accessory businesses, in deciding to license an outsider to perform that phase of their businesses (270 F.2d at 150-151, 155). They contracted with National Screen because no comparable firm was available (270 F.2d at 155).

In 1943, in settlement of a private antitrust case, National Screen agreed to grant the poster-renter plaintiffs in that case sublicenses under which National Screen made available to them for distribution a full supply of whatever standard accessories National Screen manufactured under license from any Producer (270 F.2d at 151). In all, National Screen entered into sublicense agreements with twenty-four poster renters, including eleven who were not parties to the case (270 F.2d at 151).

The Government Case.

On April 28, 1952, the United States commenced an action against National Screen and the Producers, seeking injunctive relief against alleged violations of the antitrust laws in the manufacture and distribution of standard accessories and other advertising materials. **United States v. National Screen Service Corp. et al.**, Civil Action No. 75-138 (S.D.N.Y.)

The gist of the Government's complaint, insofar as it dealt with standard accessories, was that National Screen and the Producers were engaged in a conspiracy under

which the Producers would license only National Screen to make and distribute such accessories, in violation of Sections 1 and 2 of the Sherman Act (¶¶ 34, 35, 37). The complaint specifically referred to, and sought relief for, the poster renters [¶¶ 31, 32; Prayer ¶¶ 4(c), 7].

The Government case was terminated by consent judgments entered March 29, 1957. TRADE REG. REP. (1957 Trade Cas.) ¶ 68,670. The judgments provided that the court was entering them before trial and without determination of any issue and that there had been no admission by any party. Insofar as the judgments related to the poster renters, the judgments (1) enjoined National Screen from doing anything which might prevent any person's obtaining standard accessories from anyone other than National Screen or which might limit distribution to a defined geographic area [Section IV(E)] and (2) required the Producers, so long as they licensed anyone to produce and distribute standard accessories, to license all other applicants (Section V) but expressly permitted the Producers to require all licensees to produce a full line of accessories and to meet reasonable standards as to production and national distribution facilities to service all theatres with respect to the Producer's motion pictures [Section V(B)(1), (2)].

At the hearing before Judge Sugarman on entry of the judgments, counsel for the United States read into the record the following letter from the President of National Screen to the Assistant Attorney General in charge of the Antitrust Division:[2]

"Dear Judge Hansen:

"Re: United States v. National Screen, et al.

"In connection with the discussions leading up to the entry of the consent decree in the above case, we

2. Transcript of Hearing at 3-4, United States v. National Screen Service Corp., Civil Action No. 75-138 (S.D.N.Y. March 29, 1957).

wish to advise you that it is the intention of National Screen to continue serving poster renters for a period of one year from the date of entry of this decree.

"Very truly yours,

"Herman Robbins."

The *Lawlor* Case.

In 1949 (approximately three years before the commencement of the Government case), the poster renter in Philadelphia commenced an antitrust action against National Screen and the Producers in the Eastern District of Pennsylvania. The complaint alleged that the plaintiffs had been injured because they could no longer obtain standard accessories from the Producers and charged that National Screen's exclusive licenses from the Producers were the result of a conspiracy and amounted to monopolization.

After extensive pre-trial proceedings, including appeals, the details of which are irrelevant for present purposes, the case was tried in November and December 1957 and January 1958 before District Judge C. William Kraft, Jr., sitting without a jury. Following the trial, Judge Kraft held that the defendants had not violated the antitrust laws. The Court of Appeals for the Third Circuit (Goodrich, Kalodner and Staley, *C.JJ.*) unanimously affirmed, and this Court denied certiorari. **Lawlor v. National Screen Service Corp.**, 270 F.2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960).

In its opinion, the court of appeals discussed in detail the district court's extensive findings of fact and agreed with the district court that, on those facts, there was no conspiracy and no monopolization even though National Screen's licenses, at that time, were exclusive (270 F.2d at 152).

The court discussed additional factors precluding recovery: (1) plaintiffs had not attempted to obtain licenses

for themselves from any of the Producers (270 F.2d at 154); (2) since standard accessories created for one motion picture can be used only in connection with that picture, they are not competitive articles, and the mere increase in the number of licenses obtained by one individual accomplished neither a restraint of trade nor a limitation in the source of supply (*ibid.*); (3) plaintiffs, as mere jobbers of standard accessories, had no basis for a claim that they were entitled to a continuing supply of the accessories (270 F.2d at 154-155); and (4) plaintiffs had failed to show any conspiracy (270 F.2d at 155). The Producers, "acting independently . . . decided to license an outsider to perform [the standard accessory] phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task" (*ibid.*).

The *Vogelstein* Case.

One other decision in the poster-renter litigation is important for present purposes. In **Vogelstein v. National Screen Service Corp.**, 204 F. Supp. 591 (E.D. Pa. 1962) (Luongo, *D.J.*), reproduced in the appendix to this petition (A.32), the court dismissed a complaint by a Washington, D.C. poster renter which alleged the identical claim as the complaint in the **Lawlor** case, with one addition—*viz.*, an allegation that, since May 16, 1961, National Screen had discontinued making standard accessories available to Vogelstein (and all other poster renters), thereby compelling him to go out of business (A.44).

Judge Luongo held that this made no difference because the amended complaint did "not reveal any attempt by Vogelstein to secure a license for himself, nor any indication that such a license could not be obtained" (A.46), and, "The refusal to supply accessories to Vogelstein lacks significance absent a setting of conspiracy or monopoly"

(A.44). Further, he held, the fact that the consent judgments in **United States v. National Screen Service Corp.** provided for the grant of nonexclusive licenses by the Producers was a circumstance which "can only serve to weaken Vogelstein's claim" (A.43).

The Court of Appeals for the Third Circuit affirmed per curiam (A.47), 310 F.2d 738 (3d Cir. 1962), and this Court denied certiorari. 374 U.S. 840, *rehearing denied*, 375 U.S. 873 (1963).

The Case at Bar.

Respondent, a poster renter in Atlanta, Georgia (hereinafter called "Plaintiff"), filed this case on July 17, 1961, shortly after National Screen's publicly announced determination to discontinue supplying accessories to the poster renters.

Plaintiff's complaint followed the basic thrust of the **Lawlor** and **Vogelstein** complaints. As plaintiff's counsel said when the district judge asked him how this case differed from **Vogelstein**, in which he was also counsel [3]—

> ". . . All the cases throughout the country, the Smith case in Oklahoma, Lawlor in Philadelphia and Vogelstein in Washington, wherever you go, as I see it, they are the same with respect to proof of liability."

Plaintiff alleged that, from 1947 until May 16, 1961—about two months before the filing of the complaint—Plaintiff had purchased "substantial quantities" of accessories from National Screen for sale or lease to exhibitors in the Atlanta area (C.A. App. 6 [4]) and had been "successful in developing a substantial accessories rental business" in that

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3. Transcript of Hearing at 27 (Dec. 9, 1963).

4. References in this form are to the appendix in the court of appeals.

area, supplying fifteen to twenty per cent of the theatres (C.A. App. 8), that National Screen, as "part of a nation-wide program" affecting "not only plaintiff but similarly situated poster renters throughout the United States," had stopped supplying standard accessories to plaintiff on May 16, 1961 (C.A. App. 9) and had persisted in refusing to supply Plaintiff in spite of Plaintiff's requests "to be allowed to purchase motion picture accessories from National Screen as in the past" (C.A. App. 9-10), and that Plaintiff would be forced out of business if National Screen were not required to continue supplying accessories to Plaintiff (C.A. App. 12). The complaint sought preliminary and permanent injunctive relief and a money judgment in treble the amount of the claimed damage of $100,000 (C.A. App. 14).

National Screen answered, denying any violation of law and affirmatively asserting the availability, to Plaintiff, of licenses from the Producers, similar to National Screen's, as required by the consent judgments in **United States v. National Screen Service Corp.**

Brief reference to the extensive proceedings which occurred before the case went to trial is necessary.

District Judge Lewis R. Morgan, who handled the case throughout, granted a preliminary injunction enjoining National Screen, as requested by Plaintiff, "from directly or indirectly refusing to deal with the plaintiff upon the same terms and conditions which prevailed prior to February 15, 1961."[5] The court, at the same time, denied a motion by National Screen for summary judgment. The Court of Appeals for the Fifth Circuit affirmed.[6]

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5. **Poster Exchange, Inc. v. National Screen Service Corp.**, 198 F. Supp. 557, 562 (N.D. Ga. 1961).

6. **National Screen Service Corp. v. Poster Exchange, Inc.**, 305 F.2d 647 (5th Cir. 1962).

In 1963, Plaintiff amended its complaint by, among other things, adding five Producers as defendants. Judge Morgan granted the Producers' motion for summary judgment, holding that Plaintiff was relying on essentially the same charge which had been made in the **Lawlor** case and rejected by the Court of Appeals for the Third Circuit, as discussed above. He referred also to **Vogelstein** as "an action substantially similar to the case at bar," because that case, like this one, challenged National Screen's right to stop dealing with the poster-renters. He quoted with approval the statement by Judge Luongo, referring to **Lawlor**, that, "'The resolution of those issues [monopoly and conspiracy in **Lawlor**] depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either, the defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer.'"[7] The court of appeals affirmed per curiam.[8]

Thereafter, Judge Morgan granted a renewed motion for summary judgment by National Screen, in an unreported opinion holding that the case against National Screen presented solely an issue of law which had been resolved in favor of National Screen by the decisions of the Court of Appeals for the Third Circuit in the **Vogelstein** and **Lawlor** cases (C.A. App. 233-234). The court of appeals reversed.[9]

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7. **Poster Exchange, Inc. v. National Screen Service Corp.**, 35 F.R.D. 558, 559-560 (N.D. Ga. 1963).

8. **Poster Exchange, Inc. v. Paramount Film Dist. Corp.**, 340 F.2d 320 (5th Cir.), *cert. denied*, 381 U.S. 936 (1965).

9. **Poster Exchange, Inc. v. National Screen Service Corp.**, 362 F.2d 571 (5th Cir.), *cert. denied*, 385 U.S. 948 (1966).

The net result of the pre-trial decisions in the case is that the court of appeals (1) deemed it irrelevant that, under the consent judgments in **United States v. National Screen Service Corp.**, Plaintiff could have sought licenses for itself from the Producers but decided not to do so,[10] (2) held that the material issue to be tried in the case was whether National Screen's refusal to deal with Plaintiff originated from the legitimate exercise of business judgment or was done with the intent or purpose of eliminating Plaintiff as a competitor[11] and (3) would not follow the Third Circuit's decision in **Vogelstein** because the district court's opinion in **Vogelstein** had failed to cite the cases relied on by Plaintiff and the court of appeals had not written an opinion.[12]

Following trial, Judge Morgan filed his decision in the case on February 17, 1969 (A.1).

Judge Morgan found that Plaintiff had been engaged as a poster renter in Atlanta, since about 1941, serving theatres in the Atlanta area, whereas National Screen manufactured standard accessories, and distributed them to theatres throughout the United States, for the motion pictures of the major Producers, which had ceased manufacturing and distributing their own accessories and had contracted for National Screen to do so exclusively (Findings 3, 6, 8, A.2, 4).[13] He made no finding—and there was no evidence—concerning the circumstances under which any of the ar-

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10. 305 F.2d at 652.

11. 305 F.2d at 654.

12. 362 F.2d at 573-574.

13. Since it is not feasible, within the limits of a petition for certiorari to show the basis for our disagreement with certain of the district court's findings, we present this petition on the basis of those findings but reserve the right, if this petition is granted, to urge the reasons why such findings are clearly erroneous.

rangements between National Screen and the Producers had been made.[14]

The court found that Plaintiff "by at least as early as 1947 was forced to, and did, obtain its requirements of standard motion picture accessories from National Screen" since the accessories were no longer available through the Producers' branch offices because of the exclusive arrangements then in effect between the Producers and National Screen (Finding 9, A.5). In another finding, the court noted that, prior to May 16, 1961, National Screen "sold to plaintiff substantial quantities of" standard accessories (Finding 13, A.6). The court found also that Plaintiff had been "successful in building up a substantial poster renter business at the expense of the 100 percent control which would otherwise be enjoyed by National Screen" (Finding 14, A.7).

Noting that National Screen "is and has been for many years the only concern in the continental United States with national distribution facilities for distributing standard motion picture accessories and the only concern which is now in fact receiving licenses from the major distributors of motion pictures to manufacture and distribute standard motion picture accessories with regard to films distributed by and through each of said major distributors," the court concluded that, "It is clear that National Screen has monopoly power and control both nationally and within the market area over the manufacturing and distribution of standard motion picture accessories with regard to films of the major distributors" (Finding 12, A.6).

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14. In the **Lawlor** case, the district court and the court of appeals considered such evidence and reached the conclusion that those arrangements were in all respects valid. See pp. 8-9 *supra*.

The court ignored the purging effect of the 1957 consent judgments in **United States v. National Screen Service Corp.** and ignored the undisputed fact that Plaintiff knew of the judgments and considered applying for licenses thereunder but nevertheless failed to do so (C.A. App. 827). The court's only reference to the consent judgments was in a finding reciting the provision in the judgments defining the standards which the Producers could require of an applicant for a license (Finding 15, A.7).

The court found that, after May 16, 1961, National Screen refused to sell standard accessories to Plaintiff "in spite of numerous requests by plaintiff that National Screen make available to it motion picture accessories ordered by it just as was done prior to the refusal to deal" (Finding 19, A.8). The court found that this refusal to deal had resulted in a decline of $400-$500 in Plaintiff's weekly business, that Plaintiff was unable to meet the demands of its exhibitor customers and that many of its former customers were dealing directly with National Screen as the only available source of supply (Finding 20, A.9).

On the issue of National Screen's intention when it determined to discontinue dealing with poster renters, Judge Morgan concluded that, "National Screen now cannot be heard to say that it did not intend to monopolize, but only to exercise legitimate business judgment, in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring their businesses by outright purchase" (A.16).

While it was an undisputed fact that National Screen had purchased twenty-eight poster renters in 1940, there was no evidence of National Screen's reasons for these purchases or of the poster renters' reasons for selling to National

Screen, and the district court made no finding of fact relating to the circumstances under which these acquisitions had occurred.[15]

In view of Judge Morgan's conclusion that, "National Screen now cannot be heard" to explain its motives, he ignored uncontradicted evidence offered by National Screen showing that its standard accessory business had been incurring steadily-increasing substantial losses for several years prior to 1961 (D.Exh. 6; C.A. App. 802) and that this was the reason why National Screen had determined that it could no longer supply any of the poster renters (C.A. App. 1176-1179). Instead, he found that, "The evidence does not support the defendant's position that its refusal to deal with the plaintiff was dictated by sound business policy" (Finding 24, A.10) and that, "The acts and conduct of the defendant described above were clearly with the intent of eliminating the plaintiff as a competitor" (Finding 25, A.11).

The court found that the period for which Plaintiff could recover damages from National Screen covered the four years (as prescribed by the statute of limitations[16])

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15. The district court in the **Lawlor** case found that the first Producer which engaged National Screen (in 1939) to manufacture and distribute standard accessories required National Screen "to open new exchanges throughout the country at its own expense and to employ the required sales staff in each exchange." This "required National Screen to assume leasehold and other obligations" (C.A. App. 72-73). Furthermore, that court rejected Finding 38 requested by the plaintiff, which read, "At the time of its entering into the standard renting business in 1940, National Screen intended to compel all other existing poster-renters to sell out their businesses to it or to otherwise cease doing business as poster-renters; and at that time, National Screen intended also to prevent any other person from attempting to commence doing business as a poster-renter at anytime thereafter anywhere in the United States." **Lawlor v. National Screen Service Corp.**, Civil Action No. 10,020 (E.D. Pa. Oct. 22, 1958).

16. Section 4B of the Clayton Act, 15 U.S.C. § 15b (1964).

immediately prior to the filing of the complaint (Finding 26, A.11). The court made no other findings as to damages.

In its conclusions of law, after holding that National Screen had "attempted to monopolize, and had actually monopolized, the business of distributing . . . standard accessories on a national scale, and particularly in the Atlanta exchange area," and that Plaintiff had been injured in its business or property by reason of that monopolization, the court concluded that Plaintiff had suffered damages in the amount of $150,000 and was entitled to recover thrice that amount, or $450,000, plus costs and fees (A.17), later awarded in the amount of $50,000 (C.A. App. 350).

The court ignored Plaintiff's claim for injunctive relief.

On appeal by National Screen, the Court of Appeals for the Fifth Circuit (Brown, *Ch.J.*, Ainsworth and Godbold, *C.J.J.*) affirmed (with a remand on the matter of counsel fees) (A.19).

The court of appeals rejected National Screen's position that the 1957 consent judgments, which required licenses for all on nondiscriminatory terms and contemplated that National Screen would discontinue supplying the poster renters after a year, should be given consideration in determining whether National Screen intended, or had the power, to monopolize when it discontinued supplying Plaintiff. The court characterized this as a position that the consent decree "had nationwide res judicata, collateral estoppel effect on persons who were not parties or involved" (A.25 n.11).

The court ignored the Third Circuit's holding in **Vogelstein** that National Screen did not violate the antitrust laws when it stopped dealing with the poster renters in 1961.

Faced with the district court's failure to explain the basis for its award of damages, the court of appeals adopted

a damage computation submitted by Plaintiff in a post-oral-argument brief in that court. Purporting to apply **Bigelow v. RKO Radio Pictures, Inc.**, 327 U.S. 251 (1946), the court noted that Plaintiff's net receipts (gross less cost of inventory) during the four years preceding the filing of the complaint amounted to $119,292, whereas National Screen's net receipts from distribution of standard accessories in the Atlanta area during the same period amounted to $436,745 —a difference of approximately $300,000. On this basis, the court said that, "Under the *Bigelow* formula, the District Court might have awarded a sum quite in excess of $150,000 in actual damages" (A.30).

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decision of the Court of Appeals for the Third Circuit in *Vogelstein*.

There is no dispute that the factual bases for the claim in the case at bar and the claim in **Vogelstein** are identical. The district court here expressly relied on **Vogelstein** as requiring summary judgment for National Screen in this case (see p. 12, *supra*), and the court of appeals expressly rejected **Vogelstein** in reversing that summary judgment (362 F.2d at 573-574; see pp. 12-13, *supra*).

The basic difference between the Third Circuit and the Fifth Circuit is that the Third Circuit saw the situation as it was: The sole effect of the standard accessory agreements between the Producers and National Screen was that each Producer, having made an agreement for someone else to assume responsibility for production and distribution of accessories for its pictures, no longer distributed such acces-

sories to theatres through its own branches and, therefore, no longer had any supply of accessories from which a poster renter could obtain whatever items he happened to want. That, of course, was simply the inevitable consequence of a legitimate business transaction on the part of each Producer and National Screen, and there is no basis for concluding that such a consequence renders the transaction violative of the antitrust laws. The poster renters do not assume any responsibilities for the manufacture of standard accessories or for the maintenance of inventories thereof—or, indeed, for distribution sufficient to meet any Producer's requirements.

The Fifth Circuit, on the other hand, premised its holding on the assumption that National Screen is a "monopoly." This assumption runs throughout all of that court's opinions in this case, although the court does not make clear whether it is basing its "monopoly" characterization on the fact that National Screen is the only company manufacturing each Producer's standard accessories or on the circumstance that all of the major Producers have given standard accessory licenses to National Screen.[17] Under neither theory, however, can there be a violation of Section 2 of the Sherman Act, for the offense there is not "monopoly" but "monopolization."[18]

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17. Applying the doctrine announced by Mr. Justice Holmes for this Court in **United States v. Winslow**, 227 U.S. 202 (1913), the court of appeals in the **Lawlor** case held that, since standard accessories for one motion picture can be used only in connection with that picture, they "are not competitive articles," and "therefore no mere increase in the number of licenses obtained by one individual accomplishes a restraint upon trade or limitation in the source of supply" (270 F.2d at 154).

18. *Cf.* Goodrich, *C.J.*, speaking for himself and Biggs and Maris, *C.JJ.*, constituting the three-judge district court in **United States v. Pullman Co.**, 64 F. Supp. 108, 112 (E.D. Pa. 1945), *aff'd by an equally divided Court*, 330 U.S. 806 (1947): "Here we must look rather closely at our concept of what constitutes an unlawful monopoly in this connection. The thing which got the Pullman Company into trouble was not that it was the only

There are no findings and no evidence on the issue of how National Screen became the licensee of all the Producers.[19] And, at least since entry of the consent judgment in **United States v. National Screen Service Corp.**, it is clear that National Screen has had no power to exclude anyone from obtaining licenses from the Producers.

The key question, then, is the legal effect of National Screen's refusal to supply the poster renters after May 16, 1961.[20]

The Third Circuit's view is that, "The refusal to supply accessories . . . lacks significance absent a setting of conspiracy or monopoly" (A.44). Accordingly, since National

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company furnishing sleeping car service [to the railroads], but that Pullman made it virtually impossible for anybody else to get into the business."

The classic statement of this principle is in Judge Learned Hand's opinion in **United States v. Aluminum Co. of America**, 148 F.2d 416, 429 (2d Cir. 1945): "It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it."

This Court's most recent statement of the principle is in Mr. Justice Douglas's opinion in **United States v. Grinnell Corp.**, 384 U.S. 563, 570-571 (1966).

19. The Third Circuit pointed out, in **Lawlor**, that "no comparable firm was available to undertake the task" demanded by the Producers (270 F.2d at 155).

20. That the refusal to supply after May 16, 1961 was the gravamen of Plaintiff's complaint (C.A. App. 1) and amended complaint (C.A. App. 155) is clear. This was confirmed by Plaintiff's pre-trial statements of contentions and issues, submitted just before the trial (C.A. App. 242-253). Nevertheless, Plaintiff was permitted, over National Screen's objection, to inject into the trial issues relating to National Screen's furnishing of accessories to Plaintiff **before** May 16, 1961. The court of appeals (A.25) rejected National Screen's assertion of error in this respect, and we reserve the right to rely on this error if certiorari is granted. The existence of this issue is immaterial for present purposes, because it goes only to the question whether, if a refusal to deal violates the Sherman Act under the facts of this case, Plaintiff can show that the refusal occurred earlier than May 16, 1961.

Screen had not violated Section 2 of the Sherman Act in achieving its position, as the court had previously held in **Lawlor** and reaffirmed in **Vogelstein**, National Screen was free to refuse to deal with the poster renters. The Fifth Circuit's view is that, since the court regarded National Screen as a "monopoly," National Screen was not free to do so.[21]

This Court should resolve the conflict between the Third and Fifth circuits on this point. While we think it clear that the Third Circuit's view is the correct one, the existence of a contrary decision by another court of appeals inevitably creates doubts for both the antitrust bar and the business community. Stated in terms of this case, the conflict on the question whether the Sherman Act requires National Screen to supply anyone who wants to be a poster renter should be authoritatively and finally resolved by this Court so that National Screen will know either that its present course of conduct is lawful (as the Third Circuit has held and as its counsel have advised it in reliance on that holding) or that it must decide between abandoning the manufacture and distribution of standard accessories and making them available to poster renters (as the Fifth Circuit would require).

The importance of resolving this issue is underscored by the fact that the same issue is presented in other pending

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21. The infirmity in the Fifth Circuit's reasoning is pointed up by Chief Judge Brown's reliance (A.27) on this Court's decision in **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359 (1927). There, unlike the situation here, liability for the refusal to deal with the retail-distributor plaintiff rested on the fact, found in a prior Government suit, that Eastman Kodak had achieved its monopoly position by violation of the Sherman Act. Here, the Third Circuit found no monopolization in National Screen's position, and the consent judgment assured that its position in the future would be consonant with Section 2 of the Sherman Act.

cases. It is present in **Exhibitors Poster Exchange, Inc. v. National Screen Service Corp. et al.**, now pending before this Court (at No. 763) on petition by National Screen and the Producers for certiorari to review the decision of the Fifth Circuit reversing a summary judgment in favor of the defendants by the United States District Court for the Eastern District of Louisiana. It is present also in another suit by the Plaintiff in this case, commenced on February 26, 1969 in the Northern District of Georgia (Civil Action No. 12,497), seeking damages for the four-year period beginning February 26, 1965.[22] It is present also in **Houck Theatres, Inc. et al. v. National Screen Service Corp. et al.**, a suit by theatre owners, pending in the same court (Civil Action No. 12,607). And in his brief in opposition to certiorari in No. 763 (pp. 10, 12), respondent's counsel threatens even more such actions, a threat of some consequence in view of the mass of litigation which has already been brought, a "seemingly ceaseless saga," as the court of appeals put it (A.19).[23]

2. The Decision Below, in Denying Any Effect Whatever to the 1957 Consent Judgment, Creates an Uncertainty in the Enforcement of the Antitrust Laws Which Should Be Resolved by This Court.

The court of appeals' holding that National Screen violated Section 2 of the Sherman Act was premised on the court's assumption that National Screen had "monopoly power" because no other company could acquire a license from the Producers without establishing nationwide dis-

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22. That case is now pending before the Court of Appeals for the Fifth Circuit (No. 29,025) on an appeal by Plaintiff from the district court's grant of summary judgment in favor of the Producers.

23. All of the cases in the poster-renter litigation are cataloged in the petition for certiorari in No. 763 (pp. 8-9).

tribution facilities comparable to National Screen's (A.23). The court of appeals attributed National Screen's monopoly power to the fact that National Screen's license agreements were only "nominally nonexclusive" in that they "prohibited the producer from granting other licenses unless the prospective licensee agreed to establish a nationwide distribution system like that of National Screen" (A.23), and it held that this was so even after the 1957 consent judgments in **United States v. National Screen Service Corp.**

But the consent judgments expressly provide that, "The size of the organization and facilities of National Screen shall not be used as the standard for determining the adequacy of the applicant's qualifications" [Section V(B)(1)].

Furthermore, the judgments provide that the Producers must grant nonexclusive licenses to all applicants but **may** require the applicant to maintain "production facilities and a national distribution organization and facilities to service, with respect to all feature motion pictures released . . ., all exhibitors desiring such service." There was no evidence and no finding that any Producer would in fact impose such requirements (except on National Screen). But, in any event, those requirements, according to both the court and the Department of Justice, were "reasonable business standards" [Section V(B)(1)], which the Producers could insist upon without perpetuating National Screen's alleged monopoly power which the court-imposed requirement of nondiscriminatory licenses-for-all was designed to end. If Plaintiff had to meet those standards to get a license, it was not because of any clauses in agreements between the Producers and National Screen but because the Department of Justice and the court in 1957 so stated in the judgments.

And because both the court and the Department of Justice thought that what they were doing—making li-

censes available to poster renters on "reasonable terms and conditions" [Section V(A)]—would not be an idle gesture but would prevent National Screen from having any monopoly power, they did not insist that National Screen continue indefinitely to supply the poster renters. Instead, they put into the record again, not as an exercise in futility but as both a protection for, and an admonition to, the poster renters—National Screen's commitment to continue serving them for one year. There was no doubt as to National Screen's rights thereafter, and both the court and the Department of Justice obviously felt that the exercise of such rights would not undo what the judgments had accomplished.

In short, National Screen's 1961 refusal-to-deal was permitted by the judgments and considered by the court and the Department of Justice to be in harmony with the antitrust laws.

If anyone should have second thoughts, whether the court or the Department of Justice, the judgments recited that the court retained jurisdiction to modify their provisions (Section VIII), a power the court would have had in any event. **United States v. Swift & Co.**, 286 U.S. 106 (1932); **System Federation No. 91 v. Wright**, 364 U.S. 642 (1961). And Plaintiff's counsel did, in fact, attempt to persuade the Department to seek modification of the judgments. See Petition for Rehearing, **Vogelstein v. National Screen Service Corp.**, 375 U.S. 873 (1963).

On the other hand, without citing any authority, the court of appeals treated the consent judgment as if it had never existed, had accomplished nothing and could be relied on by no one. Far from refusing to give it a "nationwide res judicata, collateral estoppel effect" (A.25 n.11), an ef-

fect which National Screen has never contended it had, the Fifth Circuit gave it no effect.

The question is not whether a judgment binds persons not parties thereto, or immunizes from private attack conduct which would otherwise violate the antitrust laws. The question is, rather, whether a judgment, designed to foster industrywide competition and which no one suggests has been violated, can be ignored in assessing the legal significance of action taken in reliance on the judgment and in complete compliance with the judgment. How could the courts below find that National Screen's 1961 refusal-to-deal was motivated by a "specific intent to monopolize" and "would result" in a "monopoly" (A.26 n.12) in the face of the fact that National Screen had been assured by the Government's judgment that a refusal to deal with the poster renters, after one year from entry of the judgment, would not constitute monopolization if the Producers and National Screen abided by the judgment? And how could the court of appeals characterize National Screen's post-judgment license agreements as exclusive in the face of the express terms of the judgment prohibiting exclusive agreements?

A consent judgment in a Government antitrust suit is entitled to more weight than an agreed judgment in a suit between private parties involving only private interests. It is a judgment fashioned by the Attorney General, who is "primarily charged by Congress with the duty of protecting the public interest under" the antitrust laws, **United States v. Borden Co.**, 347 U.S. 514, 518 (1954), and "it is a judicial act . . . and, therefore, involves a determination by the chancellor that it is equitable and in the public interest," **United States v. Radio Corp. of America**, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed on motion of appellant*, 318 U.S. 796 (1943). A consent judgment is always intended to establish a state of competition "in harmony with

law," **United States v. International Harvester Co.**, 274 U.S. 693, 702 (1927), and often to set guidelines for industrywide behavior.

These basic attributes have been recognized by this Court, which has sanctioned intervention by interested private parties in certain Government suits involving consent decrees. **Cascade Natural Gas Corp. v. El Paso Natural Gas Co.**, 386 U.S. 129 (1967); **Missouri-Kansas Pipe Line Co. v. United States**, 312 U.S. 502 (1941). The importance of the consent judgment procedure in Government enforcement of the antitrust laws has been emphasized by the Department of Justice in a recent statement to this Court.[24]

If the consent judgment is to continue to serve this useful purpose, the business community and the bar must not be left in doubt about the effect which a judgment will

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24. ". . . Resources simply are not available to investigate and prosecute to completion every possible antitrust violation. Terminating cases through consent decrees that provide effective relief enables the government to employ its limited personnel and facilities more effectively. In addition, where such a consent decree can be obtained, the government's prime objective—a change in the defendant's business practices—is accomplished and the public obtains the benefits thereof sooner than it would if the case were litigated. Finally, a consent judgment guarantees definite relief, as opposed to the uncertainty of outcome that exists whenever a case goes to trial.

"These benefits of consent decrees are not simply theoretical. During recent years, more than 70 percent of the antitrust injunctive suits brought by the Department of Justice have been terminated by consent judgments. . . .

"In the present cases the consent judgments fully terminated all the defendants' alleged illegal business practices as demanded by the government, and provided adequate relief against their repetition. The district court permitted the appellants to present their objections to the decrees fully as *amici*. The settlement of these cases completely accomplished the government's objective in filing the suits, and did so without the uncertainty, delay and expense that would have resulted had the cases been tried. . . ." Government's Motion to Affirm at 11-12, 13-14, **City of New York v. United States**, 390 U.S. 715 (1968).

be given in subsequent private litigation and the extent to which it may be relied on as a guide to future conduct. Judge Barnes, a former Chief of the Antitrust Division, has recently adverted to this problem in an opinion for the Court of Appeals for the Ninth Circuit.[25]

In the case at bar, the courts below failed to recognize the problem and, unguided by any prior pronouncement of this Court, have decided the matter in a way that would deprive consent judgments of much of their usefulness and create further uncertainty in an area of the law vital to effective antitrust enforcement. Resolution by this Court is now essential, and we believe that the Court should decide the question by holding that action taken in reliance on a Government judgment should have at least presumptive validity.

3. The Court of Appeals' Attempt to Justify, by the *Bigelow* Formula, a $450,000 Treble Damage Award in the Face of Plaintiff's Own Evidence of Damages Amounting to $1,350 Should Be Reviewed by This Court.

The district court awarded $450,000 to Plaintiff without any explanation of how the court arrived at that figure (A.17). The court found only that National Screen stopped supplying Plaintiff on May 16, 1961 (Finding 20, A.9), that Plaintiff's gross business thereupon declined by $400-$500 weekly [Finding 20(a), A.9] and that Plaintiff was entitled to recover damages up to July 17, 1961 (Find-

25. "This litigation skirts a very perplexing problem long existing in federal antitrust law, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws. . . ." **K-91, Inc. v. Gershwin Publishing Corp.**, 372 F.2d 1, 3 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

ing 26, A.11)—a period of about nine weeks. Plaintiff's testimony (C.A. App. 845) (there was no finding on the point) was that its net profits before taxes approximated ten per cent of gross. A loss of $500 in gross business for nine weeks, therefore, would mean a net loss of $450 in profits, which could justify a maximum award, after trebling, of $1,350.

In spite of these facts, the court of appeals sanctioned the district court's award of $450,000. In order to do this, the court of appeals had to hold that liability could be imposed for what had occurred before May 16, 1961 (A.25).[26] With respect to that period, the court said, "The District Court found that National Screen's pre-1961 acts of refusing to provide an adequate supply of accessories and charging 'top prices', as well as the 1961 complete refusal to deal, occurred and were motivated by the intention to drive [Plaintiff] out of the market" (A.24).

But the district court made no such finding. Even taking the district court's findings at full value,[27] the worst that they show on the subject of National Screen's pre-1961 dealings with Plaintiff is that National Screen sold accessories to Plaintiff, "determining at all times the quantity of said accessories available to [Plaintiff] and the prices to be charged therefor," and that Plaintiff had "always paid National Screen top prices" (Finding 23, A.10). Surely this does not amount to a finding that National Screen refused to provide an adequate supply of accessories, but that is the way the court of appeals seems to have read it. Nor is it a finding that Plaintiff suffered any damage whatever before May 16, 1961. There is no such finding.

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26. We pass the propriety of that holding for purposes of this petition. See note 20 *supra*.

27. Which we are not willing to do. See note 13 *supra*.

The court of appeals also stated that Plaintiff's business suffered a decline from 1957 to 1961: "In 1957 [Plaintiff] had 200-225 customers; in 1961 it had 15" (A.24). Here again, the court went far beyond the district court's finding, which was that Plaintiff "formerly had between 200 and 225 customers" and "had been reduced to approximately 15 customers" (Finding 25, A.11). The district court's finding did not specify **when** Plaintiff had 200-225 customers. Plaintiff's own testimony did: it was in May 1961 (C.A. App. 616, 620). Thus, the decline from the 200-225 level occurred **after** May 16, 1961 and not before. This is confirmed by Plaintiff's gross income figures, which remained relatively stable during the years 1957 to 1961 (P. Exh. 41; C.A. App. 626).

Thus, the court of appeals had no factual basis at all for sustaining any more than about $1,450 of the $450,000 award of damages.

In addition, the court of appeals seriously misapplied this Court's holding in **Bigelow v. RKO Radio Pictures, Inc.**, 327 U.S. 251 (1946). In **Bigelow**, the plaintiff's theatre had been excluded from playing pictures on a desirable run by the defendants' conspiracy. This Court held that, where "any more precise proof of the amount of damage" (327 U.S. at 266) is unavailable, damages can properly be measured by comparing the income earned by the plaintiff's theatre during the damage period with either (1) the income of the same theatre during an earlier period when that theatre had enjoyed the desirable run or (2) the income, during the damage period, of a theatre which had enjoyed the desirable run, where the plaintiff's theatre was at least comparable in size, location, equipment and attractiveness.

Both of those comparisons provided obviously rational yardsticks for determining the plaintiff's theatre's actual loss due to its exclusion from a desirable run during the

damage period. It is reasonable to assume that if a theatre is not excluded from a desirable run it will do as well as a comparable theatre which has the desirable run.

But neither of the two **Bigelow** yardsticks was appropriate in this case, for Plaintiff supplied precise evidence of its alleged loss of profits during the damage period.

Nevertheless, the second **Bigelow** yardstick, which the court of appeals seized on to justify the huge disparity between the actual loss of profit proved by Plaintiff—*i.e.*, $450 trebled to $1,350—and the huge award of $150,000 trebled to $450,000, rested on the proposition that Plaintiff's damages could be measured by National Screen's gross income in the area. This was a wholly inappropriate gauge in view of Plaintiff's specific evidence of its alleged loss of profits.

The yardsticks approved in **Bigelow** were acceptable to this Court as the only available, logical alternatives in the absence of more precise evidence. This Court did not approve those yardsticks as universal substitutes for more-direct proof.

Here there is not the slightest indication that the district court applied either of the **Bigelow** yardsticks in fixing the amount of its award at $150,000. Nevertheless, the court of appeals held that the **Bigelow** formula could have justified an even larger award merely because the difference between the gross receipts of the respective parties in the area was sufficient to permit a superficially plausible computation resulting in a figure in excess of the actual award.

Neither reason nor any possible legal principle can justify the district court's award, and the court of appeals' approval of that award should be reviewed and set aside by this Court.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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November 23, 1970.

Appendix.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 7665.

THE POSTER EXCHANGE, INC.,
Plaintiff

v.

NATIONAL SCREEN SERVICE CORPORATION,
Defendant.

(Filed February 17, 1969.)

OPINION; FINDINGS OF FACT AND CONCLUSIONS OF LAW.

MORGAN, *Circuit Judge.**

The plaintiff in the above-styled case, The Poster Exchange, Inc., filed in this Court on July 17, 1961, an action under the provisions of the Anti-Trust Laws of the United States, specifically under the Act of July 2, 1890 (15 U. S. C. Sec. 2), which act is commonly known as the Sherman Act. Jurisdiction of this Court in this case is predicated on Section 7 of the Sherman Act, and by Sections 4, 12 and 16 of

[* Judge Morgan became a member of the United States Court of Appeals for the Fifth Circuit on August 2, 1968.]

the Act of October 13, 1914 (15 U. S. C. 15, 22 and 16), specifically and commonly referred to as the Clayton Act.

The plaintiff herein is a Georgia corporation with offices and principal place of business in Atlanta. The defendant, National Screen Service Corporation, is a Delaware corporation. The defendant transacts and does business within the Northern District of Georgia, and has been engaged for many years in a business of distributing motion picture accessories. The plaintiff, since about 1941, has been engaged in the business of renting motion picture accessories.

The issues before the Court here are whether the evidence establishes a violation of the defendant of the Anti-Trust Laws, the establishment of a monopoly and refusal to deal with the plaintiff, such as would entitle the plaintiff to recover damages, and, if such has been established, the amount of damages which the plaintiff is entitled to recover.

Accordingly, after considering these issues and the evidence adduced upon the trial of this case, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1.

Both parties are subject to the jurisdiction of this Court.

2.

This case is a treble damage anti-trust suit brought under the provisions of Section 4 of the Clayton Act (15 U. S. C. Section 15) for alleged violations of Section 2 of the Sherman Act (15 U. S. C. Section 2).

3.

The plaintiff, from its offices in Atlanta, services its exhibitor customers in all or part of the States of Georgia, Florida, Alabama and Tennessee, which is commonly referred to as the Atlanta Exchange Area. The defendant is

a national concern and services motion picture exhibitors throughout the entire United States, but maintains an office in Atlanta, from which it services the Atlanta Exchange Area.

4.

The defendant deals in three types of advertising accessories known in the trade as "standard accessories," "specialty accessories," and "trailers." At all times in question, the plaintiff has dealt only in "standard accessories" though it has sought to obtain "specialty accessories" from the defendant. The defendant has refused at all times to make these specialty accessories available to the plaintiff.

5.

The term "motion picture advertising accessories" is used in the motion picture industry to describe posters, signs, displays and similar material placed in and around the lobbies of motion picture theatres or on billboards outside the theatre to advertise the current or coming motion picture attractions in the particular theatre.

Certain types of motion picture advertising accessories traditionally have been known in the film industry as "standard accessories." The standard accessories involved in this case are:

(a) 8 × 10 inch "stills" (black and white photographs);

(b) 11 × 14 inch lobby displays;

(c) 22 × 28 inch lobby displays;

(d) 14 × 36 inch insert cards;

(e) one sheet;

(f) three sheets;

(g) six sheets;

(h) twenty-four sheets.

6.

At all times material hereto National Screen was engaged among other things in the business of creating, manufacturing and distributing standard motion picture accessories with regard to motion picture films distributed by or through the major American distributors of motion picture films, including such distributors as Paramount Film Distributing Corporation, Twentieth Century Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, Loew's, Inc., and Columbia Pictures Corporation. Columbia Pictures Corporation now manufactures and distributes its own standard accessories on pictures distributed by or through it, but standard accessories on Columbia Pictures were formerly created, manufactured and distributed through National Screen.

7.

Standard accessories have been in use for many years. Historically the general practice in the industry was that the motion picture companies would design and manufacture the various types of standard accessories and distribute them through the company's branch offices or exchanges. Thus, at the commencement of its business in 1941, motion picture accessories were available to The Poster Exchange, Inc. through the Atlanta exchanges of major motion picture distributors and The Poster Exchange, Inc., dealt directly with the major producers of motion pictures, obtaining the posters and other accessories necessary for its business directly from them.

8.

By at least as early as 1947 all the above-named major distributors of motion picture films ceased manufacturing

or distributing motion picture accessories on films distributed by or through them and each of said distributors separately contracted with National Screen whereby National Screen was given exclusive rights upon a nation-wide basis to manufacture and distribute standard motion picture accessories with regard to motion picture films distributed by or through said major distributors.

9.

Because of the exclusive contracts entered into by each of the motion picture distributors with National Screen with the result that motion picture accessories were no longer available through the branch offices or exchanges of the film companies, the plaintiff by at least as early as 1947 was forced to, and did, obtain its requirements of standard motion picture accessories from National Screen.

10.

Plaintiff's exhibitor customers exhibit numerous films distributed by or through the major distributors and in connection with the exhibition of such films plaintiff's exhibitor customers require standard accessories manufactured and created for use in connection with the film being shown. No poster renter such as plaintiff can remain in business or meet the requirements of its exhibitor customers without ability to obtain standard motion picture accessories with regard to films distributed by or through the major distributors of motion picture films.

11.

Since at least as early as 1947 and continuing thereafter up through the filing of the complaint in this case, i.e, July 17, 1961, standard motion picture accessories on films distributed by all major distributors except Columbia have

been available only through National Screen. All standard accessories distributed in the local market with regard to films distributed by or through the major distributors are manufactured and distributed by National Screen. Prior to March 16, 1961, some such standard accessories were distributed by National Screen directly to exhibitors and some to the plaintiff, who in turn competed with National Screen in the distribution of such accessories to motion picture exhibitors.

12.

National Screen is and has been for many years the only concern in the continental United States with national distribution facilities for distributing standard motion picture accessories and the only concern which is now in fact receiving licenses from the major distributors of motion pictures to manufacture and distribute standard motion picture accessories with regard to films distributed by or through each of said major distributors. It is clear that National Screen has monopoly power and control both nationally and within the market area over the manufacturing and distribution of standard motion picture accessories with regard to films of the major distributors.

13.

Plaintiff prior to May 16, 1961, purchased standard motion picture accessories manufactured by National Screen, and National Screen sold to plaintiff substantial quantities of said accessories.

14.

Plaintiff competes with National Screen in the distribution of standard motion picture accessories to exhibitors in the market area and is the sole competitor of National Screen in the market area comprised of cities throughout

the states of Alabama, Georgia, Florida, and Tennessee. While National Screen controls the distribution of most standard motion picture accessories in the market area, plaintiff has been successful in building up a substantial poster renter business at the expense of the 100 per cent control which would otherwise be enjoyed by National Screen.

15.

Under a consent decree "in the case of United States v. National Screen Service Corporation, et al., a case in which the plaintiff was not a party" National Screen consented to a decree which among other provisions contained the following:

"V

"* * * (b) No producer Defendant shall be required to regard any person as a qualified applicant within the meaning of Subsection (a) of this section unless:

"(1) The applicant can meet and will agree to meet reasonable business standards as to reliability, financial responsibility, ability, production facilities and a national distribution organization and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service. Provided, however, that the size of the organization and facilities of National Screen shall not be used as the standards for determining the adequacy of the applicant's qualifications."

16.

National Screen's licenses from the major distributors have been nonexclusive since at least as early as 1957 and any qualified applicant as defined by said consent decree has been free to negotiate with the major distributors relative to

obtaining nonexclusive licenses to manufacture standard motion picture accessories. However, the distributors of motion picture films have traditionally insisted that licensees to manufacture its accessories have national distribution facilities, and since National Screen is the only concern meeting such requirement, National Screen is the only concern in fact licensed to manufacture and distribute standard accessories on films distributed by or through the major motion picture distributors.

17.

Plaintiff herein does not have nor has it ever had facilities or resources to manufacture or national distribution facilities with which to distribute standard motion picture accessories. Plaintiff has never been engaged in the business of manufacturing accessories.

18.

National Screen sold standard motion picture accessories manufactured by it to plaintiff for many years. However, on or about February 15, 1961, the Poster Exchange, Inc., was notified in writing by National Screen that from and after May 16, 1961, no further standard accessories manufactured by National Screen would be available to it for distribution in the market area or elsewhere.

19.

From and after May 16, 1961, National Screen has in fact refused to sell standard motion picture accessories to the plaintiff in spite of numerous requests by plaintiff that National Screen make available to it motion picture accessories ordered by it just as was done prior to the refusal to deal made effective on May 16, 1961.

20.

Since May 16, 1961, the Poster Exchange, Inc. has obtained no standard motion picture accessories from the branch office of National Screen in Atlanta, Georgia, nor directly from any other branch of National Screen. As a result of said refusal to sell by National Screen, the sole manufacturer and source of supply for standard motion picture accessories, plaintiff's business has been affected as follows:

(a) Sales and rentals of standard motion picture accessories to its exhibitor customers have declined from $400.00 to $500.00 per week since the refusal to deal by National Screen;

(b) No new business can be or is being solicited by The Poster Exchange, Inc., due to inability to obtain standard motion picture accessories from National Screen with resulting inability to meet the demands of exhibitor customers;

(c) The Poster Exchange, Inc., is unable to supply its regular exhibitor customers or any other exhibitor customers with their requirements of standard motion picture accessories. As a result, many of plaintiff's former customers are now dealing direct with National Screen as the only source of supply now available to them to meet their accessory needs. Continued inability of the plaintiff to obtain such accessories will likely mean that such customers are permanently lost.

21.

National Screen's refusal to sell standard motion picture accessories to the plaintiff will result and is resulting in the elimination of the plaintiff as a competitor with

National Screen in the distribution of standard motion picture accessories.

22.

The elimination of the plaintiff as a competitor of National Screen will give to National Screen complete control in the market area over the distribution of all standard motion picture accessories with regard to films distributed by or through the major distributors of motion pictures and all theatre owners in the market area exhibiting pictures distributed by or through the major distributors, except Columbia, will have to buy their requirement of such standard motion picture accessories from National Screen at such prices and on such terms and conditions as National Screen may establish.

23.

National Screen controls the distribution of all motion picture accessories of said major distributors in the market area. National Screen has at least since 1947 sold said accessories to The Poster Exchange, Inc., determining at all times the quantity of said accessories available to The Poster Exchange, Inc., and the prices to be charged therefor. The Poster Exchange, Inc., has always paid National Screen top prices for standard motion picture accessories which it purchased and has offered to continue to do so. It does not appear that plaintiff's business has been unprofitable to National Screen.

24.

The evidence does not support the defendant's position that its refusal to deal with the plaintiff was dictated by sound business policy.

25.

The acts and conduct of the defendant described above were clearly with the intent of eliminating the plaintiff as a competitor in the Atlanta Exchange Area and was effective to the extent that plaintiff which formerly had between 200 and 225 customers and some 60% to 70% of the standard accessory business in the Atlanta Exchange Area has been reduced to approximately 15 customers whose needs it cannot now adequately service because of its inability to acquire standard motion picture accessories and plaintiff now has less than 2% of the total standard accessory market in the Atlanta Exchange Area.

26.

The period for which plaintiff is entitled to recover damages from defendant in the instant case includes the four years immediately prior to the filing of the complaint. The complaint was filed July 17, 1961, thus the period involved is $^{198}/_{365}$ of the year 1957, all of the years 1958, 1959 and 1960, and $^{197}/_{365}$ of the year 1961.

DISCUSSION OF RELEVANT AUTHORITIES.

It appears to the Court that the case of *Eastman Kodak v. Southern Photo Materials Co.*, 273 U. S. 359, 71 L. Ed. 684, is pertinent to our factual situation here. Briefly summarized, the facts in the *Eastman Kodak* case were:

Eastman Kodak Company had a national monopoly of the market in photographic supplies, and for a few years before 1910 had sold supplies to Southern Photo Materials Company, which company operated a retail store in Atlanta. In 1910, Eastman Kodak opened its own retail store in Atlanta, and refused to sell any more supplies to Southern Photo except at the full retail price. Southern

Photo then filed an anti-trust suit against Eastman Kodak and won a jury verdict, upon which the District Court entered a judgment. Eastman Kodak appealed, but the judgment was affirmed by the Fifth Circuit Court of Appeals, and later was unanimously affirmed by the Supreme Court. The Supreme Court said in its opinion affirming the Fifth Circuit on page 375:

> "2. On the question whether the defendant's refusal to sell its goods to the plaintiff at dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong, the defendant contends not only that there was no direct evidence as to the purpose of such refusal overcoming the presumption that it was a lawful one, but that such refusal was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract. Aside from the plaintiff's contention that this contract related merely to goods that did not conflict with the sale of those which it had been purchasing from the defendant, it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff. And for this reason, if for no other, we think that the trial court rightly declined to charge the jury to the effect that such taking over of other goods by the plaintiff in itself justified the defendant in its refusal to sell to the plaintiff. And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. 'Clearly,' as was

said by the court of appeals, 'it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' This question was submitted under proper instructions. And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact."

The fundamental purpose of the anti trust laws is to promote competition to the fullest extent reasonably possible. The Court of Appeals for the Seventh Circuit stated that "competition is the soul of the anti trust laws." *A. L. B. Theatres Corp. v. Loew's*, 355 F. 2d, 495. So, based on this theory and holding, it seems clear that the deliberate throttling of a competitor, having the effect of driving him out of business, violates the anti trust laws. However, even before a competitor is driven out of business, there is authority to the effect that the mere acquisition of power to eliminate a competitor, even though that power be unexercised, may constitute a violation of the anti trust laws. *American Tobacco Co. v. United States*, 328 U. S. 781, 808; *United States v. Griffith*, 334 U. S. 100, 106, 107. Mr. Justice Douglas stated in the last cited case:

"Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under Section 2 even though it remains unexercised. For Section 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control. See *United States v. Aluminum Co. of Amer-*

> *ica* (CCA 2d N. Y.) 148 F. 2d 416, 428, 429. Hence, the existence of power 'to exclude competition when it is desired to do so' is itself a violation of Section 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co. v. United States*, 328 U. S. 781, 809, 811, 814, 90 L. Ed. 1575, 1593, 19594, 19596, 66 S. Ct. 1125. It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' *International Salt Co. v. United States*, 332 U. S. 392, 396, ante, 20, 26, 68 S. Ct. 12. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America* (F) supra. It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

Even though National Screen here contends that its course of conduct was motivated only by an intent to take advantage of a "legitimate exercise of business judgment," as distinguished from a specific intent to monopolize, it is the opinion of the Court that under the facts in this case, there is no basis for such contention. The question of a firm's specific intent to monopolize or not to monopolize cannot arise in a case where the defendant has actually achieved a complete monopoly. A distinction must be made between cases that involve only a charge of an attempt to monopolize, and in cases that involve actual completed monopolization. In the case of mere attempt to monopolize, a company can contend that it never had any specific intent to monopolize, but only an intent to exercise its best business judgment; but in a case of actual, completed monopolization, that company will be presumed to

have intended the natural consequences of its act. Judge Learned Hand stated in his opinion of the case of *Aluminum Company of America*, 148 F. 2d 416, at page 418:

> "In order to fall within Section 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

This language was quoted by the Supreme Court of the United States in the case of *American Tobacco Co. v. United States*, 328 U. S. 781.

The Supreme Court again stated in *United States v. Griffith*, 334 U. S. 100, 105:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequences of a defendant's conduct or business arrangements. *United States v. Patten*, 226 U. S. 525, 543, 57 L. Ed. 333, 341, 33 S. Ct. 141, 44 LRA NS 325; *United States v. Masonite Corp.*, 316 U. S. 265, 275, 86 L. Ed. 1461, 1473, 62 S. Ct. 1070. To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America*, (CCA 2d N. Y.) 148 F. 2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the Common Law used the term is necessary only where the facts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co. v. United States*, 196 U. S. 374, 396, 49 L. Ed. 518, 524, 25 S. Ct. 276:

> "'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.'"

So, in view of the above-quoted language, it appears to this Court that National Screen now cannot be heard to say that it did not intend to monopolize, but only to exercise legitimate business judgment, in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring their businesses by outright purchase.

Putting it another way, when a company has actually monopolized, there is no conceivable defense because monopolization is *absolutely condemned* by the Act. If this is true, then even though the defendant would lose money in the standard accessory phrase of its business as it contends that it would, the remedy would be to forego the business.

In view of the above discussion, the Court makes the following

Conclusions of Law.

1.

This Court has jurisdiction of the parties and the subject matter.

2.

The plaintiff and defendant are and have been engaged competitively in interstate commerce in the business of distributing motion picture advertising posters known as "standard accessories."

3.

Defendant has attempted to monopolize, and has actually monopolized, the business of distributing motion picture posters, known as standard accessories, on a national scale, and particularly in the Atlanta Exchange Area, which consists of all or part of the states of Georgia, Alabama, Florida and Tennessee, in violation of Section 2 of the Sherman Anti-Trust Act (15 U. S. C. Sec. 2).

4.

Plaintiff has been injured in its business and property by reason of defendant's monopolization of the business of distributing motion picture posters, known as standard accessories, on a national scale, and particularly in the Atlanta Exchange Area, which consists of all or parts of the states of Georgia, Alabama, Florida and Tennessee, in violation of Section 2 of the Sherman Anti-Trust Act (15 U. S. C. Sec. 2).

5.

The plaintiff has suffered damages in the amount of $150,000.00, and is entitled to recover from defendant treble that amount, or $450,000.00, in accordance with the provisions of Section 4 of the Clayton Act (15 U. S. C. Sec. 15).

6.

Judgment will be entered for the plaintiff, and against the defendant in the amount of $450,000.00, plus costs,

including reasonable attorney's fees, the amount of which is to be later determined.

It Is So Ordered.

This the 14th day of February, 1969.

/s/ Lewis R. Morgan
Lewis R. Morgan
United States Circuit Judge.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27,302.

THE FOSTER EXCHANGE, INC.,
Plaintiff-Appellee-Cross Appellant,

v.

NATIONAL SCREEN SERVICE CORPORATION,
Defendant-Appellant-Cross Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(Filed August 24, 1970.)

Before BROWN, *Chief Judge*, AINSWORTH and GODBOLD, *Circuit Judges*.

BROWN, *Chief Judge*.

Here we write again in this seemingly ceaseless saga of antitrust litigation [1] between the local distributors of

1. This Court has recently written in the New Orleans phase of this litigation and there chronicled some of the history of the litigation and the industry involved. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 5 Cir., 1970, — F. 2d — [No. 26643, January 26, 1970]. The most complete history of this industry is, however, set out in *Lawlor v. National Screen Service Corp.*, 3d Cir., 1959, 270 F. 2d 146, *cert. denied*, 1960, 362 U. S. 922, 80 S. Ct.

motions picture advertising accessories[2] and the vertically integrated single producer and national distributor of the accessories, National Screen Service Corporation. This chapter, the Atlanta phase, has been elaborated by three previous opinions of this Court.[3]

The plot of this chapter revolves around monopoly — § 2 of the Sherman Act.[4] Poster claimed that National Screen

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1 (cont'd)
176, 4 L. Ed. 2d 742. See also *Landes v. National Screen Service Corp.*, 1948, 340 U. S. 322, 75 S. Ct. 865, 99 L. Ed. 1122; *Vogelstein v. National Screen Service Corp.*, E. D. Pa., 1962, 204 F. Supp. 591; *Lipp v. National Screen Service Corp.*, E. D. Pa., 1960, 188 F. Supp. 245; *The Poster Exchange, Inc. v. National Screen Service Corp.*, N. D. Ga., 1963, 35 F. R. D. 588, aff'd, 5 Cir., 340 F. 2d 520; *National Screen Service Corp. v. The Poster Exchange, Inc.*, 5 Cir., 1962, 305 F. 2d 647.

2. "Standard accessories" consist principally of lithographed posters, large and small, and photographs of scenes from a motion picture, which along with window cards and other similar articles, are displayed in and about theatre lobbies and on billboards in order to stimulate public attendance at a current or future exhibition of a motion picture.

3. The previous appearances of this case in this Court were:

Poster I: *National Screen Service Corp. v. Poster Exchange, Inc.*, 5 Cir., 1962, 305 F. 2d 647, in which this Court in an opinion written by Judge Gewin affirmed the District Court's denial of National Screen's motion for summary judgment and Poster Exchanges motion for preliminary injunction and said there were issues of fact to be resolved;

Poster II: *Poster Exchange, Inc. v. Paramount Dist. Corp.*, 5 Cir., 1965, 340 F. 2d 320, in which this Court affirmed the District Court's summary judgment in favor of the film producing companies; and

Poster III: *Poster Exchange, Inc. v. National Screen Service Corp.*, 5 Cir., 1966, 362 F. 2d 571, in which this Court, in an opinion written by Judge Tuttle, reversed the District Court's summary judgment in favor of National Screen.

4. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. A. § 2.

used its position as the only producer and supplier of standard accessories for motion pictures to "monopolize" the Atlanta area market for the distribution of the accessories to movie exhibitors. Poster alleges two separate acts of monopolization. First, it claims that as far back as the statute of limitations can reach, here it is assumed that that is July, 1957, National Screen refused to provide Poster with an adequate supply of accessories, refused to grant Poster a sublicense, and priced the accessories that were provided at the same price that National Screen distributed material to the exhibitors—the "over-the-counter" price. The second claim was that in 1961 National Screen completely refused to continue supplying any accessories to Poster.

The case was tried without a jury and the District Court found that there had been monopolization and assessed damages of $150,000, tripled pursuant to 15 U. S. C. A. § 15[5] to $450,000. It also awarded attorney's fees of $50,000 to Poster Exchange. National Screen attacks the District Court's finding of liability, finding as to the amount of damages, and the amount of attorney fees awarded. Poster Exchange contends that the amount of attorney's fees awarded was inadequate. We, however, reject all of these contentions. But we remand for additional consideration of the amount of attorney's fees.

I.

The history of this industry-wide dispute has been set out several times by many Courts, including this one, and need not be restated here (See note 1, *supra*).

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5. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. A. § 15.

National Screen is the sole holder of a license to produce and distribute standard accessories for the large domestic movie producing companies.[6] It obtained this position after a substantial number of firms were already in the business of marketing the accessories to motion picture exhibitors. Poster is a local distributor-jobber in the Atlanta area.

Without specifics and details reflected in the numerous prior opinions, the claim made here took this shape. Prior to 1940 the major domestic motion picture producers produced and distributed standard accessories through local distributor-jobbers in major cities. Between 1940 and 1947 National Screen was licensed[7] by the producing companies to be the exclusive producer-distributor of standard accessories and to distribute them on a nationwide basis.

Armed with the exclusive licenses National Screen in 1943 bought out 28 of the local distributor-jobbers. In 1943 Philadelphia area jobber-distributors brought an antitrust action—the "Allied Suit". Shortly thereafter it was settled and National Screen agreed to sublicense the plaintiffs in that action, and did grant them and some others sublicenses. But even though Poster began making requests for such a

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6. The production companys for which National Screen produced and distributed accessories are Paramount Film Distributing Corporation, Warner Brothers Pictures Distributing Corporation, University Film Exchange, Inc., Columbia Pictures Corporation, United Artist Corporation, 20th Century Fox Film Corporation, as well as RKO and Loew's.

7. In 1940 National Screen obtained an exclusive license from Paramount and RKO. In 1942 such a license was obtained from Loew's, Inc. and the other big domestic producers were soon distributing standard accessories through National Screen:

Universal	August 1, 1944
Columbia	April 12, 1945
United Artists	January 21, 1946
Warner	March 22, 1946
Fox	July 1, 1947

sublicense as early as 1943 and made this request repeatedly, National Screen refused to grant it a sublicense. Meanwhile National Screen had entered the Atlanta Exchange Market. During this period National Screen did, however, supply Poster with accessories, but only in limited quantities, not enough for Poster to supply its customers. The prices charged were substantially higher than those paid by other sublicensees. In fact the prices were the same that National charged the other exhibitors—the over-the-counter prices.

About 1950, when the original exclusive licenses from the producers expired, National Screen entered into nominally nonexclusive agreements with all of the producers. These agreements, however, contained a type of "Most Favored Nation Clause" that prohibited the producer from granting other licenses unless the prospective licensee agreed to establish a nationwide distribution system like that of National Screen, and agreed to a full line production of accessories.

In 1954 the United States filed an antitrust action in the Southern District of New York (see note *infra*). And pursuant to a consent decree of 1957, National Screen considered itself obligated to continue to grant sublicenses.[8] The nominally nonexclusive provision of the license from the producers was also retained. Although during these years Poster had survived without a sublicense, its market share declined drastically. In about 1942-43 it had about 60% of the market in the Atlanta area, but by 1961 its share had declined to only 24%. In these years National Screen's share, which was zero when it started, rose to over 70%. In

8. The Consent Decree does not specify under what conditions National Screen was to deal with distributor-jobbers. But it is very clear that it considered itself obligated for a year—another unspecified limitation.

1961 National Screen leveled its final blow. It adopted a nationwide policy under which it refused to provide accessories to any distributor-jobber. Following this, Poster's share of the market fell to 2%. In 1957 it had 200-225 customers; in 1961 it had 15.[9] The District Court found that National Screen's pre-1961 acts of refusing to provide an adequate supply of accessories and charging "top prices", as well as the 1961 complete refusal to deal, occurred and were motivated by the intention to drive Poster out of the market.

II.

National Screen presents three challenges to the District Court's findings and conclusions. In the first, a double-feature National Screen argues that liability is prohibited by the 1957 consent decree entered in the Government anti-trust suit[10] and because *Lawlor v. National Screen Service Corp.*, 3 Cir., 1959, 270 F. 2d 746, *cert. denied*, 1960, 362 U. S. 922, 80 S. Ct. 676, 4 L. Ed. 2d 742 is controlling. These contentions have, however, been presented to this Court twice and have been rejected twice, first in Judge Gewin's 1962 opinion in Poster I and again in Judge Tuttle's opinion in

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9. Keeping the figure of the trade, Poster, in a verbal "trailer", has amply stated the essence of its two real claims:

> "It appears from the evidence that the defendant effectively stifled the plaintiff's business by degrees. First, entering exclusive contracts with the major producers, followed by refusal to grant a sub-license to the plaintiff to deal in standard accessories, followed by tactics making it difficult and impossible for the plaintiff to buy adequate supplies over-the-counter from the defendant, and finally, on May 16, 1961, by absolutely refusing to make any supplies whatever available to the plaintiff at any price, this being the final crowning blow."

Poster's Brief, p. 47.

10. The Consent Decree was entered in *United States v. National Screen Service Corp.* (civ. action 17-138, 1957 C. C. H. Trade Cases ¶ 68,670).

Poster III in 1966. (See note 3, *supra*). We reject them thrice.[11]

Second, National Screen contends that Poster in pretrial response to a discovery request and in its pleadings, there had been admissions that precluded imposing liability for pre-1961 acts. But we think it is plain that the District Court did not read these as reflecting a final, absolute judicial admission; nor do we. At most they related solely on the ultimate issues as just a few more pieces of evidentiary footage, which the District Court could, but was not required to credit. As a last reel, the whole trial would have been a waste. That De Mille epic would not have been carried out if anyone, including the Judge, believed that Poster Exchange after years of protest were now telling the Judge that until 1961 everything was rosy.

National Screen's third contention, which is closely related to the second, is that the District Court's fact findings upon which the conclusion of Sherman Act liability is based are not supported. But this challenge begins with the heavy burden of F. R. Civ. P. 52(a)'s clearly erroneous standard. *Lawlor v. National Screen Service Corp.*, 3 Cir. 1959, 270 F. 2d 146, 152, *cert. denied*, 1960, 362 U. S. 922, 80 S. Ct. 676, 4 L. Ed. 2d 742. This greatly simplifies our quest. There is direct testimony of present and former employees of Poster Exchange as well as testimony of former National Screen employees that prior to 1961 National Screen had restricted the number of accessories available to Poster and priced the accessories that were supplied at a "top price". The testi-

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11. As to the 1957 decree we do not believe that either *United States v. Borden Co.*, 1954, 347 U. S. 514, 74 S. Ct. 703, 98 L. Ed. 903; *Sam Fox Publishing Co., Inc. v. United States*, 1961, 366 U. S. 683, 81 S. Ct. 1309, 6 L. Ed. 2d 604; *K-91 Inc. v. Gershwin Publishing Corp.*, 9 Cir., 1967, 372 F. 2d 1, *cert. denied*, 1968, 389 U. S. 1045, 88 S. Ct. 761, 19 L. Ed. 2d 838; or other cases referred to by National Screen support the position that this consent decree had nationwide res judicata, collateral estoppel effect on persons who were not parties or involved.

many also showed that this, as well as the 1961 complete refusal to deal, was done with the intention of driving Poster out of the market.[12] On this approach we think that there was quite enough to warrant the District Court's fact finding.

These three challenges are really previews. The main feature here is National Screen's argument that even on the facts found there can be no § 2 liability. The review of that argument starts with the central element of the plot—National Screen was the only producer of standard accessories. During the period for which liability is asserted, National Screen's licenses from the producers were only nominally nonexclusive.[13] National Screen certainly had, as the District Court found, monopoly power within all conceivable market conditions. In order for another company to have acquired a license it would have had to make a multimillion dollar investment. The producing companies required under their "Most Favored Nation" clauses required nationwide distribution facilities, full line producing and

12. There is no doubt that the general rule requires a finding of specific intent to monopolize. *See Schine Chain Theatres v. United States*, 1948, 334 U. S. 110, 68 S. Ct. 947, 92 L. Ed. 1245; *National Screen Service Corp. v. Poster Exchange, Inc.*, 5 Cir. 1962, 305 F. 2d 647. And we have such a finding here. But we also have a finding that a monopoly would result from National Screen's conduct. As the Court said in *United States v. Griffith*, 1948, 334 U. S. 100, 105, 68 S. Ct. 941, —, 92 L. Ed. 1236, 1242, it is "not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws had been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement."

13. National Screen acquired its position as the sole producer of standard accessories for motion pictures produced by the major domestic producers in the 1940s under exclusive contracts. We do not pass on the legality of those exclusive dealing contracts. *See Lawlor, supra.* It is enough here that National Screen had monopoly power at the manufacturing level and used it to prevent competition at the distributor-jobber level. As the Court said in *United States v. Griffith*, 1948, 334 U. S. 100, 107, 68 S. Ct. 941, —, 92 L. Ed. 1236, 1243, it "follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

direct competition with National Screen's already established organization. Moreover, Poster was only a local distributor-jobber. And the District Court was entitled to conclude that Poster cannot be required to convert the nature of its business, make a multimillion dollar investment and become a nationwide distributor just to survive in the Atlanta area. *See United States v. Aluminum Company of America, Inc.*, 2 Cir. 1945, 148 F. 2d 416.

The District Court's fact finding, which comes under Rule 52(a)'s clearly erroneous umbrella, was that National Screen intentionally used the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level. Such conduct has long been held to violate § 2. This is just the type of evil that the prohibitions on tying and other such per se violations are aimed at. As Mr. Justice Clark said in *Times-Picayune Pub. Co. v. United States*, 1953, 345 U. S. 594, 611, 73 S. Ct. 872, —, 97 L. Ed. 1277, 1291; "the essence of illegality . . . is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."

Moreover, the Supreme Court has long ago condemned a vertically integrated manufacturer-retailer from using its power at one level to drive out competition at another. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 1927, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684, a retail distributor of photographic equipment brought a private antitrust action seeking recovery under § 2. The jury found that Eastman had refused to continue selling photographic equipment to plaintiff at a wholesale price and that Eastman's activities were motivated by a desire to eliminate plaintiff as a competitor in the Atlanta retail market. The Supreme Court held that there had been a § 2 violation.

National Screen was found to have engaged in the same kind of intentional monopolistic conduct. And this conduct cannot be defended on the ground that it was only the exercise of legitimate business judgment. National Screen did introduce an accounting analysis that indicated that in the years preceding [14] 1961 it did sustain nationwide losses in its Standard Assessory Division.[15]

But National Screen for its own inarticulated reasons stayed in the business,[16] either as a loss leader, feeder, or for whatever reason. And the District Court was entitled to infer that National Screen's decision to stay in the standard accessory business even in the face of losses indicated that its decision to stop dealing with distributor-jobbers was not "dictated by sound business policy." And there was no evidence that dealing through distributor-jobbers was more expensive than dealing directly with the exhibitors. Nor was there any indication that efficiency could be improved by dealing directly. *Times-Picayune, supra.*

There can be no doubt that becoming a complete monopoly may improve a business' financial condition. But becoming a monopoly simply to make more money is

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14. 1959 $161,200
1960 $184,058
1961 $244,900

15. There was evidence that indicated that in some licenses from some producers there were percentage-of-profits provisions under which National Screen did, however, continue to make payments to producers from its Atlanta operation. We do not, however, consider these payments the basis for the District Court's finding nor of central importance here.

16. After the 1961 decision to stop dealing with distributor-jobbers became effective, losses as computed by the accounting firm relied on by National Screen went up.

1962 $381,056
1963 $415,933
1964 $523,511

not a "legitimate business justification" for "monopolizing."

III.

National Screen's objection to the amount of damages assessed also must overcome the high hurdle of the Rule 52(a) clearly erroneous standard. And here that standard is raised even higher by the well established rule that although the fact of injury must be certainly proved, the amount of loss, because of its very nature, can be estimated on any reasonable basis. *Eastman Kodak Co. v. Southern Photo Materials, supra; Bigelow v. RKO Radio Pictures, Inc.*, 1945, 327 U. S. 251, 66 S. Ct. 144, 90 L. Ed. 652; *Store Parchment Co. v. Paterson Parchment Paper Co.*, 1931, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544.

National Screen's basic argument about the amount of damages is that Poster was entitled to recover damages only from the time of the complete refusal to deal in 1961.[17] In final analysis, however, this contention rests on the argument that Poster had by pre-trial admissions abandoned its theory of liability for the pre-1961 acts and on the argument that the District Court's findings of fact regarding this period are not supported by the record. We have of course rejected both of these contentions. Thus on the findings we have credited that Poster was entitled to recover damages for that wrong as well as for injury resulting from National Screen's complete refusal to deal in 1961.

Our assaying the reasonableness of the $150,000 in damages found by the District Court can be based on the formula—a comparison of the net receipts of the parties—Mr. Justice Stone set out in *Bigelow, supra.* For there is no doubt that there was ample basis for using that formula

17. Damages were claimed up to the time this suit was filed in the summer of 1961.

here.[18] And it is clear that use of the *Bigelow* formula is not precluded by *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 5 Cir., 1967, 383 F. 2d 97, *cert. denied*, 1968, 390 U. S. 904, 88 S. Ct. 816, 19 L. Ed. 2d 870, referring to it. Under the *Bigelow* formula the District Court might have awarded a sum quite in excess of $150,000 in actual damages.[19]

In view of the grossly predatory practices engaged in by National Screen and the fact that Poster's once substantial business had been almost destroyed, certainly the $150,000 awarded was not excessive.

IV.

Both National Screen and Poster Exchange are dissatisfied with the amount of attorney's fees awarded. National Screen claims the $50,000 awarded is grossly excessive while Poster claims it is completely inadequate and requests that the award be increased by $100,000. At the outset we think the services were worth at least $50,000 for work done at the District Court level and we affirm the District Court's award as a floor. See *Grigsby v. Coastal Marine Service*, 5 Cir., 1969, 412 F. 2d 1011, 1042. We

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18. There is no surmise or conjecture about the applicability of *Bigelow*. There was an established business with a substantial part of the market and that business was a profitable operation. That operation, however, became less and less profitable while National Screen, which started from nothing, captured most of the market by predatory practices. And there can be no doubt that National Screen and Poster had similar relations with exhibitors and were certainly handling fungible goods.

19.

	Poster Exchange	*National Screen*
Gross Receipts	$264,297	*$929,245
Cost of inventory	$145,005	$492,500
Net receipts	$119,292	$436,745

* Atlanta Exchange area only.

believe that this matter should be remanded for consideration of factors, which we apprehend were perhaps not given appropriate consideration or weight by the District Court.[20] The District Court should consider the time, difficulty, and perseverance required to succeed against such formidable, resourceful opposition to determine whether the $50,000 award should be increased. Independently of the fee fixed for work at the District Court level, the Judge should also fix the fee for all of the appellate work including that done on the instant appeal. He should take into account all of the factors including those briefly summarized here. Although National Screen contends the case is simple, it required 111 pages for its pre-argument briefs and it has also filled a post-argument brief. Counsel for Poster was required to respond at length and here it might be appropriate to repeat, moreover, that this is the fourth time this case has been in this Court. We feel that this is the time to compensate the attorneys for the tenacity displayed in this litigation.

AFFIRMED IN PART AND REMANDED IN PART.

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20. We do not put this in terms of abuse of discretion. Abuse of discretion is undoubtedly the proper standard for review, not artificial percentage of the single damages. See *W. W. Montague & Co. v. Lowry*, 1904, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608; *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 6 Cir., 1965, 346 F. 2d 661, *cert. denied*, 382 U. S. 904, 86 S. Ct. 239, 15 L. Ed. 2d 157.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 29526

HARRY VOGELSTEIN,
TRADING AS BALTIMORE POSTER COMPANY,
Plaintiff

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.,
Defendants.

(Filed March 30, 1962.)

LUONGO, *District Judge.*

In this antitrust action, defendants' motion to dismiss the complaint has presented the Court with the following issue:

Does a stipulation entered into by the parties on November 4, 1957 during the course of a prior suit[1] and the dismissal of that action in accordance with the terms of the stipulation compel us likewise to dismiss the instant complaint?

The details of the history of the litigation are essential to the resolution of the issue. The matter really has a prehistory. In 1942 various poster leasing dealers instituted a treble damage antitrust action against National Screen

1. *Harry Vogelstein, trading as Baltimore Poster Company v. National Screen Service Corporation*, Civil Action No. 11678.

Service Corporation (hereinafter referred to as National Screen) and others. *Allied Poster & Supply Corporation v. National Screen Service Corporation*, Civil Action No. 2472. The complaint alleged that exclusive license agreements whereby motion picture producers authorized National Screen to manufacture and distribute motion picture advertising accessories, constituted a violation of the antitrust laws. That action was settled and dismissed with prejudice. One of the terms of the settlement agreement required National Screen to make available, by sublicense, certain material to the dealers who were plaintiffs in that action.

On December 5, 1950, while the sublicense agreements were in effect, Vogelstein, who was not a party to the Allied suit but who was permitted to purchase materials from National Screen, filed a complaint (hereinafter referred to as "*Vogelstein #1*") in this Court (Civil Action No. 11678) against the same defendants who are named as party defendants in the matter now before us. "*Vogelstein #1*" alleged that defendants "* * * had conspired to monopolize, and had actually monopolized the business of distributing motion picture advertising posters throughout the United States in violation of Sections 1 and 2 of the Sherman Anti-trust Act [15 U. S. C. A. §§ 1, 2]." That suit was one of seven similar suits in which various poster dealers sued the same defendants stating their claims in substantially the same terms and basing their actions on identical theories of the case.

Like the *Allied* case the allegations of unlawful monopoly and conspiracy in these seven suits were predicated on the exclusive licenses to produce and distribute advertising accessories which various motion picture producers had granted to National Screen. The period for which damages were sought and the period during which the alleged unlawful monopoly and conspiracy came into existence and flourished was 1943-1949. The events alleged to have occurred

during those years, as we shall demonstrate later in this opinion, are crucial in resolving the issue in the instant case.

Of the seven cases, *Lawlor v. National Screen Service Corporation*, Civil Action No. 10020 (hereinafter referred to as "Lawlor") had been docketed earliest.[2] At pre-trial conferences held in October and November 1957, Judge Kraft, to whom the *Lawlor* case had been assigned, aware of the six companion cases, "* * * suggested that the parties endeavor to reach some agreement which would obviate the necessity to retry in any of the companion cases certain of the issues to be litigated in the Lawlor case". *Lipp v. National Screen Service Corporation*, 188 F. Supp. 245, 246 (D. C. E. D. Pa. 1960).

On November 4, 1957, those discussions resulted in an agreement between the parties which provided in part:

> "In the remaining six cases if, by final judgment in whatever shall have been the court of last resort, it is determined in Civil Action No. 10020 that no conspiracy or unlawful monopoly existed, that finding shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist, then the remaining six cases shall be consolidated for trial and tried without a jury."

During the conference at which the above agreement was recorded, attention was called to another case, Civil Action No. 22707 (hereinafter referred to as "*Vogelstein #2*"), in which parties plaintiff to the seven suits then pending joined in one complaint containing seven counts, one for each plaintiff, alleging the same cause of action as was contained in the pending suits, but seeking damages for the

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2. The *Lawlor* case has had an extensive history in the Courts. A summary of this history is found in *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, 147-148 (3rd Cir. 1959).

period subsequent to the commencement of those original suits. "*Vogelstein #2*", the supplemental action, was not included in the stipulation.

Lawlor was tried in November-December 1957, and January 1958, and resulted in judgment for defendants. One hundred forty findings of fact and twelve conclusions of law were issued by the Court, including the following two conclusions of law:

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act."
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

Judgment was affirmed on appeal, 270 F. 2d 146 (3rd Cir. 1959) and plaintiffs' petition for certiorari was denied by the Supreme Court, 362 U. S. 922 (1960).

At this point we must reemphasize that in *Lawlor*, in "*Vogelstein #1*", and in the other five cases as well, the acts alleged to be the basis of unlawful monopoly and conspiracy occurred during the period "from August 19, 1943 to August 18, 1949, inclusive". Judge Kraft, in *Lawlor*, found that that conduct did not constitute an unlawful conspiracy and monopoly.

Defendants thereupon moved for summary judgment not only in the six companion cases (including "*Vogelstein #1*"), but in the supplemental action (including "*Vogelstein #2*") as well. Dissatisfied with the *Lawlor* decision, plaintiffs in the companion cases tested the effect of the stipulation by opposing those motions. In *Lipp v. National Screen Service Corporation, supra*, 188 F. Supp. at pages 247-248, Judge Kraft entered judgments in favor of defendants, and discussed the valid and binding effect of the stipulation in the following terms:

"Since the issues of liability were determined adversely to the plaintiffs in *Lawlor*, the clear and unequivocal terms of the pre-trial agreement require judgments for the defendants in the six companion cases, which were expressly made the subject of the agreement. Plaintiffs' contentions to the contrary are wholly devoid of merit.

"Plaintiffs assert that they have not 'had their day in court.' They urge the fact that at the *Lawlor* trial, on objection, we excluded certain evidence inadmissible in the *Lawlor* trial which might have been admissible in the trial of one of the six companion cases. Our ruling was clearly correct for the reason, as we then stated, that 'the stipulation did not embrace any agreement that evidence which was admissible in one case not on trial should be admissible in the case now on trial though otherwise inadmissible therein.'

"Plaintiffs further contend that the judgment of dismissal in *Lawlor* 'was based, in large part, on dozens of the court's findings of fact peculiar to the plaintiffs in that case, and, therefore, totally inapplicable to any of the cases involved in these proceedings.' Even if such be the fact, it affords no sufficient reason to nullify a stipulation clear and unequivocal in its terms, free of any limitation or qualification and entered into only after the most thoughtful and prolonged consideration and discussion among counsel. The actions had then been pending for some seven years and *Lawlor* had already had, before trial, a noteworthy appellate history. Presumably, all of the mature, experienced and able counsel were quite aware of the existing factual circumstances in each of the cases and none would have hesitated to insist upon appropriate reservations,

conditions or qualifications, to the stipulation, had a substantial difference in facts in any case so required."

The Court also entered judgment for defendants in the supplemental actions. At the time the stipulation was recorded the parties' attention was called to the fact that it did not expressly include the supplemental action. This matter was discussed and counsel for plaintiff summed up the thinking of all counsel when he said:

> "* * * as a practical matter, that suit [*"Vogelstein #2"*] being merely supplemental to this suit, as Mr. Mullinix says, and Mr. Ward, it simply carries on, it simply brings the other case down to date. And, certainly, if, as we have assumed, for instance, that the Court finds that there is no liability here, no violation of the Sherman Act, the second suit will certainly be dead when its parent dies." *Lipp v. National Screen Service Corporation, supra,* at p. 247.

That being the understanding by counsel of the scope and effect of the stipulation, the course to be followed by the Court was clear.

On appeal, the Court of Appeals affirmed the decision of the District Court, 290 F. 2d 321 (3rd Cir. 1961) and at page 322 stated:

> "The agreement made among counsel was no compromise of a lawsuit. It was, instead, a common sense way of handling several cases involving the same points. The judge could have ordered a consolidated trial for all of them. * * * It was considered more feasible to handle the litigation in the manner stipulated for. Defendants took their chances on judgments against them in seven cases if the *Lawlor* case was won. Plaintiffs took their chances on losing if the *Lawlor* case was lost. * * *"

We finally turn to the complaint before us, that filed in April, 1961 (hereinafter called "*Vogelstein #3*" or "present complaint"). The complainant, Vogelstein, is engaged in the business of supplying motion picture theatres with advertising materials, such as posters, etc. Defendant, National Screen Service Corporation, manufactures and supplies advertising paraphernalia to theatre operators throughout the United States and the remaining defendants are the principal producers and distributors of motion picture films in the United States. The complaint is so short and its wording so critical to the issue, that we have reproduced the following averments:

> "1. On December 5, 1950, the plaintiff herein filed a complaint in the said court which was docketed as Civil Action No. 11,678 of 1950.
>
> "2. In said complaint plaintiff alleged, in substance and effect, that the defendants therein, who were the same as the above named defendants in the instant action, had conspired to monopolize, and had actually monopolized, the business of distributing motion picture advertising posters throughout the United States in violation of sections 1 and 2 of the Sherman Anti-Trust Act.
>
> "3. On June 3, 1957, plaintiff, among others, commenced a second action in the same court, against the same defendants, alleging in substance and effect, that all defendants had continued and were still continuing, the illegal acts and practices complained of in said Civil Action No. 11,678 of 1950, and praying inter alia, for treble the damages suffered since December 5, 1950. Said second action was docketed in said court as Civil Action No. 22,707 of 1957.

"4. All of the defendants have continued and are still continuing to monopolize the business of distributing motion picture advertising posters as alleged in the complaints filed in Civil Action No. 11,678 of 1950, and No. 22,707 of 1957."

Plaintiff, in "*Vogelstein #3*", prays for damages from the time of the filing of "*Vogelstein #2*", June 31, 1957 to the date of the filing of "*Vogelstein #3*". On January 11, 1962, an amendment to "*Vogelstein #3*" was filed containing one allegation, the nature and effect of which will be considered later. Defendants have moved to dismiss "*Vogelstein #3*" and the amendment thereto.

Courts are cautious in dealing with motions to dismiss, particularly where to grant the motion would terminate the litigation before the parties have had their day in court. We are aware that the Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962) has cautioned us that "* * * summary procedures should be used sparingly in complex antitrust litigation * * *." With this in mind, we approach the motion before us even more warily since the basis for the motion is a stipulation and the subsequent entry of summary judgment pursuant to that stipulation. Nevertheless, after consideration of all the pleadings previously referred to, the motions to dismiss will be granted.

The allegations in the present complaint constitute a reiteration, by incorporation by reference, of the allegations contained in "*Vogelstein #1*". Nothing substantively new is contained in the present complaint, which merely alleges that an unlawful monopoly and conspiracy, created during 1943-1949 continues to the present and has injured plaintiff. If the conduct complained of during 1943-1949 was not unlawful, the continuance of that conduct cannot be unlawful. The monopoly and conspiracy issues,

based on events occurring during the 1943-1949 period, are common both to "*Vogelstein #1*" and to "*Vogelstein #3*", the present complaint. Consequently the resolution of those issues in "*Vogelstein #1*" operates as an estoppel in these subsequent proceedings against the parties bound by the original action.

The Supreme Court in *Cromwell v. County of Sac.*, 94 U. S. 351, 353 (1876), quoting Lord Ellenborough, said:

> "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

Also see *United States v. International Building Co.*, 345 U. S. 502 (1953).

It makes no difference, so far as the issue before us is concerned, whether or not defendants' conduct is regarded as a series of individual torts or as one continuing tort. What is important is that there was an *adjudication* on the monopoly and conspiracy issues in *Lawlor*. Those issues were common and crucial to each of Vogelstein's complaints. By stipulation the findings in *Lawlor* were made applicable to "*Vogelstein #1*". The combined effect of the trial of *Lawlor* and the stipulation, therefore, was a determination that defendants did not unlawfully conspire or monopolize and Vogelstein is bound by that determination. The stipulation was designed to avoid repetitive and protracted litigation. It sought to do so by the resolu-

tion, for all the cases, of the two crucial issues common to all, i.e., monopoly and conspiracy.

It is true that the judgment in favor of defendants in *Lawlor* is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in *Lawlor* had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer.

The stipulation, as we interpret it, covered not only existing claims for damages but subsequent claims as well, where those claims are based on the same alleged acts of conspiracy and monopoly as were before the Court in *Lawlor* and in plaintiffs' original complaint. Indeed, the parties themselves so interpret it. Mr. Anderson, counsel for plaintiffs in *Lawlor* and also counsel for plaintiffs in the instant case, in referring to what we have labeled "*Vogelstein #2*", stated that it was merely supplemental to the original complaint; the former simply brought the latter up to date. We can perceive no difference in the character of "*Vogelstein #2*" and the complaint now before us. The present complaint merely brings "*Vogelstein #1*" and "*Vogelstein #2*" up to date. Therefore, a determination, after a full hearing on the merits of crucial issues, which, by stipulation, disposed of "*Vogelstein #1*", is also dispositive of the matter before us.

Plaintiff relies on *Lawlor v. National Screen Service Corporation*, 349 U. S. 322 (1955) [3] for the proposition that neither the principles of *res judicata* nor of collateral estoppel operate as a bar to the present suit. However, the facts in the *Lawlor* case distinguish it from the matter before us. In 1943 the case of *Allied Poster & Supply Corporation v. National Screen Service Corporation*, Civil Action No. 2472, an antitrust action started in 1942, was settled prior to trial. Plaintiffs therein withdrew that suit which was dismissed "with prejudice". Thereafter, Lawlor, one of the plaintiffs in Allied and a party to the settlement, instituted another antitrust action against the same defendants. Defendants' plea of *res judicata* was rejected by the Supreme Court. No question of collateral estoppel was involved because the case had never been tried. In order for parties to be subsequently precluded from challenging issues there must first be findings on which the determination of those issues was based. In *Lawlor* there was no adjudication and there were no findings. *Res judicata* was also inapplicable since the judgment was unaccompanied by findings and the parties were not bound on any issue.

The Supreme Court concluded that the 1943 action and the suit before it were not based on the same cause of action because:

(a) the conduct complained of occurred after the 1943 judgment;

(b) new antitrust violations were alleged;

(c) the claims sued on could not have been sued on in the prior action;

(d) in the interim alleged substantial changes in the scope of the monopoly had occurred.

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3. This reference is to one of the pretrial proceedings in the *Lawlor* case to which we have many times referred above.

Both *Lawlor* and the matter before us involve subsequent antitrust actions after previous complaints had been dismissed. At this point similarity ends. The most significant difference is that in the instant case there was a previous adjudication of the issues and although this was accomplished by means of a "test case" and stipulation, it in no way diminishes the fact that there were findings on the issues of conspiracy and monopoly.

At argument on the motion to dismiss the Court asked counsel for Vogelstein if he had any additional evidence over and above that presented at the *Lawlor* trial. His reply was, in effect, that the case *might* be tried differently, or that it *might* be tried by other counsel who *might* present the case in a different fashion. At no time did he indicate to the Court that he was in possession of additional evidence to present, only that the case might be differently tried (and tried to a jury rather than to the Court alone).

Vogelstein has not alleged that the scope of the alleged monopoly has increased since the *Lawlor* trial, and in fact, the contrary may be true. All of Vogelstein's complaints, including the present complaint, are founded upon the exclusive licenses given by the movie producers to National Screen. Those exclusive licenses were held not to constitute a monopoly in *Lawlor*. Since that time, as part of the litigation in *Lipp v. National Screen Service Corporation, supra*, Judge Kraft, in a Memorandum Opinion filed May 31, 1961, found that National Screen has been operating under non-exclusive licenses from the major motion picture producers since 1952. In addition, a consent decree was entered into in the Southern District of New York on March 29, 1957 by which the major motion picture producers agreed to grant only non-exclusive licenses to producers and distributors of advertising accessories. 1957 Trade Cases ¶ 68,670. That circumstance can only serve to weaken Vogelstein's claim.

Plaintiff suggests that the Court, in *Lawlor*, did not find that there were no antitrust violations, but found only that plaintiffs in that case failed to prove a violation of the antitrust laws. There is nothing in the terms of the stipulation indicating that Vogelstein was not to be bound by the stipulation if *Lawlor* fell because of a failure of proof. He agreed to be bound by the resolution of the conspiracy and monopoly issues in *Lawlor*. The Court in *Lawlor* found no unlawful conspiracy or monopoly. (Conclusions of Law 2 and 3). The distinction which Vogelstein now asserts is more semantic than legal.

We turn our attention now to the amendment to "*Vogelstein #3*". That amended complaint was filed, without leave of Court, subsequent to, and unquestionably as a result of questions asked by the Court during oral argument on the motion to dismiss "*Vogelstein #3*". The amended complaint is the same as "*Vogelstein #3*" with the exception that it contains the additional allegation that National Screen, with the knowledge and consent of the other defendants, has, since May 16, 1961, discontinued making standard accessories available to Vogelstein thereby compelling him to go out of business.

Accepting that additional allegation as true, we are not led to a different conclusion. The refusal to supply accessories to Vogelstein lacks significance absent a setting of conspiracy or monopoly. The amended complaint alleges no facts which would supply that setting. On the issues of conspiracy and monopoly Vogelstein is still relying on the allegations contained in "*Vogelstein #1*" and we have earlier determined that on those issues, for the period covered by "*Vogelstein #1*" (1943-1949), he is now precluded.

The Court in *Lawlor* found during the period 1943-1949: that National Screen did not monopolize nor attempt to monopolize (Conclusion of Law 2); that none of defendants conspired with each other (Conclusion of Law 3); that National Screen was in competition with plaintiffs

(Finding of Fact 126); that National Screen made standard accessories available to twenty-four sub-licensees, eleven of whom were not parties to the *Allied* settlement (Finding of Fact 115); that there was nothing to indicate that plaintiffs could not manufacture or obtain the right to manufacture or fabricate any kind of accessories, in fact poster dealers throughout the United States other than plaintiffs manufactured and distributed various advertising accessories (Finding of Fact 116). The Court of Appeals, summarizing the findings in *Lawlor*, stated that "each of the film companies involved in this suit entered into the contracts [with National Screen] for a good and sufficient economic reason, namely to terminate an unprofitable feature of its business". *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, 151 (3rd Cir. 1959). Finally, by 1952, National Screen was operating under non-exclusive licenses, and this was certainly the case after 1957 (*supra*, p. 1617).

That the refusal to supply accessories to Vogelstein is insufficient to upset the foregoing basic findings is apparent from the following statement by the Court of Appeals in *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146 (3rd Cir. 1959), at pp. 154-155:

> "Plaintiffs have never attempted to obtain from any of the film companies licenses under which they themselves would manufacture accessories and, in fact, have expressly stated that they do not desire such licenses. In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an antitrust action.
>
> • • •
>
> "It is abundantly clear to this court that the plaintiffs, by their own choice, are nothing more than jobbers in the field of standard accessories, and thus come within the purview of cases involving exclusive dealer-

ships such as *Locker v. American Tobacco Co.*, 2 Cir., 1914, 218 F. 447 at page 450, where it was stated: 'We are unable to discover anything illegal in a manufacturer of tobacco disposing of his goods to a jobber to sell to retailers, or, if he deems it advisable, to change his policy, and sell direct to the retailer himself. Why may he not do so? One who desires to become a jobber has no right to complain because the manufacturer chooses another to do this work, unless the manufacturer owes some duty to consign his product, or a part of [sic] thereof, to him.' "

The above enumeration of the deficiencies in the *Lawlor* case guides our evaluation of Vogelstein's present attempt to supply those deficiencies. The single additional allegation in the amended complaint avails him little in that regard.

The amended complaint does not reveal any attempt by Vogelstein to secure a license for himself, nor any indication that such a license could not be obtained. It refers still, by incorporation of previous pleadings, to "exclusive" licenses, a situation which no longer exists. No facts are averred to meet the statement by the Court of Appeals that National Screen may refuse to supply all poster dealers including Vogelstein.

We cannot view this complaint in a vacuum. It is part of a continuum of litigation between the parties. We are bound to consider the *Lawlor* adjudication and the stipulation. Cf. *Poster Exchange, Inc. v. National Screen Service Corporation*, 198 F. Supp. 557 (D. C. N. D. Ga. 1961).

For the foregoing reasons the motions to dismiss the complaint and the amended complaint will be granted.

In view of the ruling on the motions to dismiss it is unnecessary to reach the issue raised by defendants as to security for costs.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 14,056.

HARRY VOGELSTEIN, TRADING AS BALTIMORE POSTER COMPANY,

Appellant,

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed December 20, 1962.)

Before KALODNER and FORMAN, *Circuit Judges*, and ROSENBERG, *District Judge*.

PER CURIAM: Upon review of the record we find no error.

The Order of the District Court, 204 F. Supp. 591, will be affirmed.